

Appl. No. 10/630,493
Docket No. AA541MC
Amdt. dated February 5, 2008
Reply to Office Action of Oct. 5, 2007
Customer No. 27752

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REMARKS

Claim Status

Claims 1-27 are pending in the present application. No additional claims fee is believed to be due.

Claim 1 is amended to include the phrase "wherein the water-insoluble substrate comprises a skin facing side and an occluded side, the occluded side having an air permeability of less than about 5 mg/cm²/min". Support for this amendment may be found on page 8 of the specification.

Claims 12 and 16 are cancelled without prejudice.

Claims 13-15 are amended to maintain antecedent basis.

Claims 21-27 are withdrawn as a result of an earlier restriction requirement and may be subject to rejoinder.

These changes do not involve any introduction of new matter. Consequently, entry of these changes is believed to be in order and is respectfully requested.

Rejection Under 35 USC §112, First Paragraph

The Office repeats rationale presented in the Office Action of May 15, 2007. Applicant reasserts that the claim language of "from about X to about Y" is clear as written to an ordinary person. The term "about" which serves as a term of approximation. *See Merck & Co. v. Teva Pharmaceuticals USA Inc.*, 73 U.S.P.Q.2d 1641, 1648 (Fed. Cir. 2005) ("about" should be given the ordinary and accepted meaning of "approximately"). The specification consistently uses the term "about" in reference to viscosity and particle size. See pages 10, line 14 – page 15, line 29. Furthermore, the specification clearly describes how to determine particle size (page 12, lines 2-5) and viscosity (page 11, lines 4-8).

Applicant respectfully requests withdrawal of the rejection.

Rejection Under 35 USC §103(a)

Claims 1-11 and 17-19 have been rejected under 35 USC §103(a) as being unpatentable over U.S. Patent No. 5,997,887 to Ha et al ("Ha") taken with U.S. Patent No. 6,337,066 to

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Jacquier ("Jacquier") and European Patent Application No. 0063875 to Okamura ("Okamura") in view of U.S. Patent No. 4,076,663 to Masuda et al ("Masuda") taken with U.S. Patent No. 6,548,075 to Bengs et al. ("Bengs") and Ztaz et al. *J. Pharmaceutical Science*. In support of this rejection, the Office repeats the rationale presented in the Office Action of May 15, 2007. The Office continues to assert that "Ha et al. teach a liquid composition comprising a water insoluble substrate (see col. 18, lines 35-38) as a lipid or oily material. Oils are hydrophobic in nature and are commonly known to one of ordinary skill in the art as water insoluble." The Office appears to be arguing that Ha's disclosure of an oil teaches Applicant's present limitation of "a water insoluble substrate." The teaching of Ha is directed to the hydrophobic phase of an emulsion. Col. 18, line 30. It does not follow that this hydrophobic phase (*e.g.*, oil) is a substrate.

The Office further asserts that claims are given their broadest reasonable interpretation. The key is that the interpretation be reasonable. Applicant asserts that the term "substrate" cannot be read so broadly as to include Ha's teaching of an oil-phase within an emulsion. There is no evidence on record suggesting that a skilled artisan would read the term substrate to include an oil.

The Office contends that Applicant is addressing references separately and not for what "the combined teachings of the references would have suggested." However, Applicant is merely pointing out the errors in the Office's assertions. For example, the Office states "one of ordinary skill in the art would have been motivated to substitute the oily or lipid base of Ha et al. with the cotton yarn of Okamura, based on the end-product sought." The Office is asserting that a skilled artisan would substitute a substrate (per Okamura) in for the oil phase of an emulsion (per Ha). Applicant asserts that a skilled artisan would not make the substitution as argued by the Office.

In order to advance prosecution of the case, Applicant has amended the claims to recite a preferred embodiment. Specifically, Claim 1 recites that the water-insoluble substrate comprises a skin facing side and an occluded side, the occluded side having an air permeability of less than about 5 mg/cm²/min. This element was previously presented

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in Claim 12. It should be noted that no rejection based on prior art was presented for Claims 12. As a result, Claim 1 as amended is believed to be in condition for allowance.

Double Patenting

Claims 1-15 are provisionally rejected on the grounds of nonstatutory obviousness-type double patenting over claims 1-13 of copending Application No. 10/622,518. In support of this rejection, the Office repeats the rationale presented in the Office Action of May 15, 2007. MPEP § 804(II)(B) states, "[T]he analysis employed in an obviousness-type double patenting rejection parallels the guidelines for analysis of a 35 U.S.C. 103 obviousness determination." In light of Claim 1 as amended, the Office provides no valid reason for why one skilled in the art would modify the subject matter as presented in the claims of Application No. 10/622,518. Furthermore, the claims of Application No. 10/622,518 fail to teach each and every element of the amended claims in the present application.

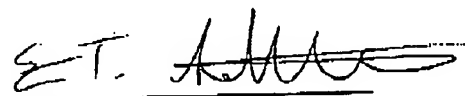
Conclusion

This response represents an earnest effort to place the present application in proper form and to distinguish the invention as claimed from the cited references. In view of the foregoing, entry of the amendments presented herein, reconsideration of this application, and allowance of the pending claims are respectfully requested.

Respectfully submitted,

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